91-474

No. _____

In The

Supreme Court of the United States

October Term, 1991

VELMA MARTIN, on behalf of herself and all others similarly situated,

Petitioner,

v.

LOUIS J. SULLIVAN, Secretary of the Department of Health and Human Services,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in its construction of a Social Security Act statutory term which has been interpreted in a directly contrary manner both by this Court in another portion of the Social Security Act and by the New York Court of Appeals in a nearly identical context.

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PETITION FOR WRIT OF CERTIORARI

Velma Martin, on behalf of herself and of the class which she represents, petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-12a) is reported at 932 F.2d 1273. The prior opinion of that court

(App. 13a-19a), which was superseded by the above opinion, is reported at 912 F.2d 1168. The decision of the district court (App. 20a-36a) is reported at 694 F.Supp. 718. The order of the court of appeals denying the petition for rehearing and rejecting the suggestion for rehearing *en banc* (App. 37a) is unreported.

JURISDICTION

The superseding opinion of the court of appeals was entered on May 14, 1991 (App. 1a), and the timely filed petition for rehearing was denied on June 24, 1991 (App. 37a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The relevant portion of section 1382a of Title 42, United States Code, states:

> (a) For purposes of this subchapter, income means both earned income and unearned income; and . . . (2) unearned income means all other income, including – . . . (B) any payments received as an annuity, pension, retirement, or disability benefit, including veterans' compensation and pensions, workmen's compensation payments, old-age, survivors, and disability insurance benefits, railroad retirement annuities and pensions, and unemployment insurance benefits. . . .

STATEMENT

Reversing the decision of the district court, the court of appeals upheld a regulation of the Supplemental Security Income (SSI) program that counts as income received amounts which are withheld to recover an overpayment from another program and which are therefore not in fact paid to the SSI applicant. The legal premise of this bureaucratic fiction is the pretense that the withheld amounts are "constructively received" and are therefore properly counted pursuant to 42 U.S.C. § 1382a(a)(2)(B). Its practical effect is to treat SSI applicants as if they possessed more income than in fact is the case, and therefore to deny or reduce benefits to these impoverished people.

1. SSI is a welfare program for which eligibility is dependent on available income and resources. Congress established it in order to "provide[ ] a subsistence allowance, under federal standards, to the Nation's aged, blind, and disabled." *Schweiker v. Wilson*, 450 U.S. 221, 223 (1981) (footnote omitted); see also 20 C.F.R. § 416.110.

Crucial to the calculation of the amount of an SSI benefit is the determination by the Social Security Administration (SSA) of the applicant's income. In light of the needs-based nature of the program and its overall goals, limitations have been placed on what may be counted as income. See, *e.g.*, *Grunfeder v. Heckler*, 748 F.2d 503, 506 & n.2 (9th Cir. 1984) (*en banc*); *Robinson v. Bowen*, 828 F.2d 71, 73 (2d Cir. 1987) (Oakes, J., dissenting). Thus, income is only that which "you can use to meet your basic needs for food, clothing, or shelter," 20 C.F.R. § 416.1102, and, conversely, "[s]ome things you receive

are not income because you cannot use them as food, clothing, or shelter. . . . " *Id.*, § 416.1103.

A consistent theme throughout the history of the SSI program has been the notion of "actual availability". Indeed, originally, the regulations themselves expressly stated this fundamental principle: "In determining the amount of unearned income the amount actually available to the individual is considered." 20 C.F.R. § 416.1120 (1977); see also, *e.g.*, *Summy v. Schweiker*, 688 F.2d 1233, 1235 (9th Cir. 1982) (purpose of SSI program is best advanced by counting only income "which is actually available to meet the beneficiary's needs").

At all times since its passage in 1972, the statute has reflected this cornerstone of the SSI program by stating that only "payments received" would be counted as income. 42 U.S.C. § 1382a(a)(2)(B). Accordingly, for the program's first ten years, SSA did not count as income any amounts which were being withheld by another program to recover an overpayment. See, *e.g.*, 20 C.F.R. § 416.1123(a) (1981).

"In 1982, however, a different Secretary decided, essentially, to make a policy reversal. . . . This . . . major policy reversal [was] unaccompanied by any change in the underlying SSI statute." *Szlosek v. Secretary of Health & Human Services*, 674 F.Supp. 944, 947 (D.Mass. 1987), aff'd, 861 F.2d 13 (1st Cir. 1988); see also *Healea v. Bowen*, 871 F.2d 48, 50 (7th Cir. 1988). This admitted "policy change" (47 Fed.Reg. 6885 (Feb. 17, 1982)) was premised on a 180-degree turnabout in SSA's interpretation of the statutory word "received", namely, that "[t]he amount withheld [to recover the overpayment] is received by the individual

since it is used to reduce the individual's obligations." 47 Fed.Reg. 13793 (April 1, 1982). Nevertheless, the new regulation, which is here at issue, expressly recognizes that the withheld amounts are not in fact received:

> (b) *Amount considered as income.* We may include more or less of your unearned income than you actually receive. (1) We include more than you actually receive where another benefit payment . . . has been reduced to recover a previous overpayment. . . .

20 C.F.R. § 416.1123.

2. Petitioner Velma Martin, a widow now 72 years of age, was one of many victims of this abrupt change. In January 1987, the Railroad Retirement Board began to withhold her entire monthly survivor's benefit of $268.16 for 34 months in order to recover an overpayment which had occurred over five years previously. This action left her with only $386 per month in income, which is nearly one-third less than the income level guaranteed for SSI recipients in that year.

Accordingly, she applied for SSI benefits on January 29, 1987. She was found ineligible at each of the four levels of SSA's administrative process, however, due to the regulation requiring that the amount withheld by the Railroad Retirement Board be treated as income to her. Because SSA pretended that this money was available to her, her "income" was over the SSI limit.

3. Mrs. Martin then filed a complaint in the district court for the Northern District of California, and moved for summary judgment on both her statutory and constitutional claims, and for certification of a class including

all affected residents of jurisdictions within the Ninth Judicial Circuit. On June 10, 1988, the district judge granted both motions.

He held that the regulation was invalid because it violated the "plain meaning" of the statutory term "received" (App. 28a-29a), rejecting the holding of other courts that the word was merely a "grammatical link" with no substantive meaning. App. 25a-26a. He bolstered his analysis by relying on prior decisions of the Ninth Circuit which had implemented actual availability, the concept motivating Congress' use of the term "received": "These cases are united by the same underlying principle: funds that a recipient cannot actually use to meet her basic needs should not be treated as income for SSI eligibility." App. 28a (footnote omitted). The district judge also concluded that "other indicia of congressional intent . . . compel the invalidation of this regulation," citing, in particular, "the basic purpose of the SSI program." App. 29a.[1]

The district court then issued an order declaring the regulation invalid, enjoining its enforcement in the jurisdictions of the Ninth Circuit, and, accordingly, directing SSA to pay retroactive and prospective benefits to Mrs. Martin and the class members. Pending SSA's appeal, the judge stayed that portion of the order which required the payment of retroactive benefits.

The government appealed, but did not ask the court of appeals to stay any other portions of the district

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[1] The district court did not reach petitioner's alternative constitutional argument. App. 35a n. 7.

court's orders. As a consequence, the challenged regulation was not in effect in the Ninth Circuit for months after August 1988, and, therefore, SSA did not count as income any amounts withheld by other programs.

4. A panel of the court of appeals heard oral argument on May 3, 1989, and issued its first decision on August 31, 1990. App. 13a. In that decision, the appellate court rejected the reasoning of the district court on the ground that four other circuits had ruled to the contrary regarding the regulation. It held that "received" was merely a "grammatical link". App. 16a-17a. Also, the court below concluded that its use in only one subsection of 42 U.S.C. § 1382a(a)(2) meant that Congress had "reject[ed] an actual receipt requirement." App. 17a. The panel also rejected the district judge's conclusion that the regulation conflicted with congressional intent. App. 18a-19a.

Petitioner timely sought rehearing and suggested the propriety of rehearing *en banc*, noting, *inter alia*, that the panel had ignored longstanding and controlling rules of statutory construction. On May 14, 1991, after the government filed a response, the court below issued a new opinion. App. 1a. It was substantially the same as the original, with the only change being the insertion of $10^1/_2$ new paragraphs and a footnote. These paragraphs were directed exclusively at distinguishing three prior decisions of the Ninth Circuit which had discussed availability in the context of the SSI program. App. 4a-10a.

The panel therefore adhered to its original holding that the only relevant precedents for resolution of the appeal were the decisions of other circuits upholding the

challenged regulation. App. 18a. Accordingly, it vacated the decision of the district court and remanded the case for further proceedings. App. 12a.

On June 24, 1991, the court of appeals issued an order rejecting the petition for rehearing and suggestion for rehearing *en banc*. App. 37a.

REASONS FOR GRANTING THE PETITION

The decision below cannot be reconciled with unanimous decisions of this Court and of the New York Court of Appeals interpreting the same crucial statutory word "received". In the former instance, this Court analyzed that word as it appeared in another portion of the Social Security Act. In the latter, New York's highest court considered the effect of that language in the context of a state program which, as in this case, treated benefits withheld as if they were received. Those courts gave the word its common, ordinary meaning, and did not revise its import by inserting a broadening adjective before it.

The contrary determination of the court below reflects its failure to comply with, or even acknowledge, the traditional rules of statutory construction. Its determination not to deviate from the other appellate courts which had upheld the regulation at issue has thus led it to neglect the controlling effect of decisions which provide a road-map to the correct interpretation of the statute.[2]

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[2] The other appellate decisions upholding the regulation are *Healea v. Bowen*, 871 F.2d 48 (7th Cir. 1989); *Szlosek v.*

(Continued on following page)

1. In Title IV of the Social Security Act, the AFDC statute, Congress allowed the states to deny AFDC benefits to a child "with respect to any week for which such child's father receives unemployment compensation under an unemployment compensation law of a State or of the United States." 42 U.S.C. § 607(b)(2)(C)(ii), quoted in *Philbrook v. Glodgett*, 421 U.S. 707, 711 (1975). Vermont's regulatory interpretation of this statute, however, was to deny AFDC when the father was eligible for unemployment compensation, even if he did not in fact receive unemployment benefits. *Philbrook*, 421 U.S. at 712.

In unanimously affirming the decision of a three-judge district court which had rejected Vermont's interpretation of the statute, this Court considered the key statutory term "receives". Writing for the Court, Justice Rehnquist began by noting that the statute "speaks in terms of a 'father [who] *receives* unemployment compensation' rather than a 'father [who] is *eligible* to receive unemployment compensation.' " *Id.* at 713 (emphasis in original). He then stated the traditional rule of statutory

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Secretary of Health & Human Services, 861 F.2d 13 (1st Cir. 1988); *Robinson v. Bowen*, 828 F.2d 71 (2d Cir. 1987); *Lyon v. Bowen*, 802 F.2d 794 (5th Cir. 1986). The fact that the appellate courts are in agreement, however, does not preclude this Court either from granting the petition or reaching the opposite conclusion on the merits. See, *e.g.*, *Melkonyan v. Heckler*, 895 F.2d 556 (9th Cir. 1990), cert. granted, 111 S.Ct. 669, vacated, 111 S.Ct. 2157 (1991) (unanimously vacating decision of court of appeals even though three other circuits had agreed with the lower court). The focus of this petition is on the tension between the decision below and the decisions of this Court and New York's highest court. See Supreme Court Rule 10.1(a), (c).

construction: "Our objective in a case such as this is to ascertain the congressional intent and give effect to the legislative will." *Id.* at 713. After determining that nothing in the statutory scheme indicated that a different interpretation should be given to "receives" than the word suggests, *id.* at 714-718, the Court thus held that the "District Court correctly concluded 'that a family eligible for [AFDC] benefits . . . can be excluded only for each week in which unemployment compensation is *actually received* by the father.' " *Id.* at 719 (emphasis supplied).

Similarly, the New York Court of Appeals, also unanimously, rejected New York's practice of treating amounts withheld to recover SSI overpayments as income received for purposes of eligibility for the state's home relief program. *Wasservogel v. Blum*, 54 N.Y.2d 100 (1981). As in *Philbrook* and this case, the crucial statutory language was a form of the verb "to receive":

> That section provides that "A person who *is receiving* federal [SSI] payments . . . shall not be eligible for home relief" . . . and [another section] of the same law mandates that "No person *receiving* federal [SSI] payments . . . shall *for the same period* receive any other of such forms of assistance". . . .

54 N.Y.2d at 103 (emphasis in original). Based on this straightforward language, the Court of Appeals drew the only logical conclusion: "A person who is not receiving a payment because of a prior prepayment cannot *in any realistic sense* be said to be receiving the payment and certainly is not receiving the payment for the same period." *Ibid.* (emphasis supplied).

Thus, in two decisions interpreting the very word at issue here, this Court and New York's highest court have, without a single dissent, recognized that "receive" means precisely what it appears to mean. A person is not receiving benefits if she has not applied for them or if they have been withheld after application. Agencies may not change the meaning through the pretense that the word is synonymous with "eligible for" or "qualifies for", nor may they alter its meaning by adding crucial adjectives such as constructive. If Congress had intended such an amorphous notion of availability, it would not have used a specific term like "received". Of course, Congress could decide to make that change, but the agency itself is not free to unilaterally alter an eligibility condition in the face of static statutory language.[3]

2. *Philbrook* and *Wasservogel* are significant for this case not just because they interpret the same term here at issue in a manner directly contrary to the analysis of the court below, but also because, unlike the court of appeals, the courts in those cases applied traditional rules of statutory construction. The court below never mentioned or alluded to these rules, and therefore could ascribe a meaning to "received" for which there is no support in the statutory scheme. The significance of this failing is rendered the more egregious in light of this Court's numerous recent explications of statutory construction. If

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[3] After the ruling in *Philbrook*, Congress amended the statute to replace "receives" with "qualifies for". Pub.L. No. 94-566, § 507(a)(2), 90 Stat. 2688 (1977). The statute at issue in *Wasservogel* had been changed in the other direction, from "eligible for" to "receiving". 54 N.Y.2d at 613 n.*.

those rules had been followed in this instance, the court below would not have been unrestrained in its reconstruction of "received".

It is now beyond dispute how courts must carry out the task of interpreting statutes: "On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' " *NLRB v. United Food and Commercial Workers Union*, 108 S.Ct. 413, 421 (1987) (citation omitted); see also, *e.g.*, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). "If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843 (footnote omitted).[4]

" 'In determining the scope of a statute, we look first to its language. . . . ' " *Moskal v. United States*, 111 S.Ct. 461, 465 (1990) (citation omitted); see also, *e.g.*, *Mansell v. Mansell*, 109 S.Ct. 2023, 2028 (1989); *Mallard v. U.S. District Court for Southern District of Iowa*, 109 S.Ct. 1814, 1818

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[4] In that situation, the question of deference to the agency never arises. See, *e.g.*, *Demarest v. Manspeaker*, 111 S.Ct. 599, 603 (1991); *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct. 2524, 2539 (1991) (Scalia, J., dissenting). If deference were at issue here, however, this case presents a classic instance for little or no deference, as the 1982 regulation reversed the existing agency policy and was not issued contemporaneously with the statute which it purported to implement. See, *e.g.*, *Pauley*, 111 S.Ct. at 2535; *United Food & Commercial Workers Union*, 108 S.Ct at 421 n.20. Other courts considering this regulation expressly held that the usual deference was not appropriate in this instance. *Healea*, 871 F.2d at 50; *Szlosek*, 674 F.Supp. at 948.

(1989). This commonsense approach is based on "the strong presumption that Congress expresses its intent through the language it chooses." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987); see also, *e.g.*, *FMC Corp. v. Holliday*, 111 S.Ct. 403, 407 (1990).

Moreover, courts should "giv[e] the 'words used' their 'ordinary meaning'. . . . " *Moskal*, 111 S.Ct. at 465 (citation omitted); see also, *e.g.*, *Mallard*, 109 S.Ct. at 1818 ("everyday speech"). "Th[e] ordinary and obvious meaning . . . is not to be lightly discounted." *Cardoza-Fonseca*, 480 U.S. at 431. Thus, it is generally impermissible to attribute to the statutory language something other than its true meaning: "[C]ourts 'are not at liberty to create an exception where Congress has declined to do so.' " *Freytag v. C.I.R.*, 111 S.Ct. 2631, 2636 (1991) (citation omitted); see also, *e.g.*, *Norfolk & Western v. American Train Dispatchers*, 111 S.Ct. 1156, 1163 (1991); *Cardoza-Fonseca*, 480 U.S. at 452-453 (Scalia, J., concurring in the judgment). It is thus appropriate, and a consistent practice of this Court, to employ the dictionary definition of terms which are not otherwise defined. See, *e.g.*, *Mallard*, 109 S.Ct. at 1818; *Pittston Coal Group v. Sebben*, 109 S.Ct. 414, 420 (1988).

Other relevant tools of construction place additional restrictions on the reviewing court. Specifically,

> "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."

Russello v. United States, 464 U.S. 16, 23 (1983), quoted in *Cardoza-Fonseca*, 480 U.S. at 432. Of similar consequence is this traditional rule: "In construing a statute we are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). To do otherwise would be to "violate[ ] the cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 108 S.Ct. 1537, 1550 (1988); see also, *e.g.*, *Freytag*, 111 S.Ct. at 2638; *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

This litany of unremarkable standards and directives is relevant here because the court below effectively ignored or contradicted every one of them, beginning with the first, that the traditional rules of construction should be used. It thus refused to give effect to the intent of Congress. Instead of giving the word "received" its "ordinary and obvious meaning," it expanded the meaning of the term in a manner that Congress neither devised nor suggested. The court accomplished this by ignoring the dictionary definition of "receive", which is "[t]o take into possession and control; accept custody of; collect." *Black's Law Dictionary* (5th ed. 1979) at 1433.[5] That definition allows for no exception based on the broadening adjective "constructive", yet the court of appeals embarked on precisely that course.

Thus, instead of following the path of statutory construction which would result in a recognition that "received" means "received", and not more, the court

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[5] The lay definition is substantially the same: "to come into possession of." *Webster's New Collegiate Dictionary* (1975) at 964.

simply "agree[d] with the other circuits that the more plausible construction of § 1382a(a)(2)(B) is that which rejects an actual receipt requirement." App. 10a. While this approach may have preserved inter-circuit harmony, the court's determination to reach that conclusion led it to ignore the analysis which this Court's carefully honed rules of statutory construction demanded.[6]

The court below compounded its error by violating the requirement that courts not disregard statutory language. Its effort to render "received" irrelevant went beyond treating it as if the word "constructively" appeared before it, for it also held that the word was just a grammatical link in the scheme. The effect of this maneuver was to render "received" meaningless, in direct violation of this Court's mandate "to give effect . . . to every word Congress used." *Reiter*, 442 U.S. at 339.

Moreover, the fact that the word "received" appears in only subsection (B) of § 1382a(a)(2) does not, as the court below would apparently have it, suggest that Congress meant no significance by its use. To the contrary, the discrete inclusion of "received" in subsection (B) only reinforces the impression that Congress was acting with

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[6] See *Cervantez v. Sullivan*, 719 F.Supp. 899, 914 (E.D.Cal. 1989) (in applying the plain meaning of "received" to enjoin the counting of garnished amounts as income, court observes that "the analysis in *Lyon* contravenes both well-settled principles of statutory construction and the statutory scheme itself"), appeal pending, No. 90-15056 (9th Cir.); see also *Cervantez v. Sullivan*, 739 F.Supp. 517, 523 (E.D.Cal. 1990) (Secretary's analysis of "received" is so unreasonable that government's position is not substantially justified for purposes of fee award), appeal pending, No. 90-16082 (9th Cir.).

specific intent. See *Cardoza-Fonseca*, 480 U.S. at 432. If anything, Congress was especially concerned that the payments mentioned in that subsection would only be counted if in fact they were received. *Cervantez*, 719 F.Supp. at 914-915.

3. This Court and the New York Court of Appeals have correctly used the common meaning of the word "receive" to reject statutory interpretations which replace that meaning with a broader one – one in which "receives" means "eligible to receive" or "would be receiving but for some intervening eventuality". That is precisely the effect, however, of the challenged regulation at issue.

In contrast to these two decisions interpreting the same word in nearly identical contexts, the court below has accepted a revisionist interpretation of that simple language. It has done this with the palpable goal of not straying from the decisions of the appellate courts which had upheld the regulation, even though, in order to do so, it has had to repudiate the most fundamental and well established rules of statutory construction.

The statute's "plain and precise language" creates "a formidable obstacle" and "a daunting standard", *Mansell*, 109 S.Ct. at 2028, 2030, and effectively terminates the discussion: "When we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag*, 111 S.Ct. at 2636. In the context of a program designed to provide a subsistence level of existence to the nation's most impoverished citizens, the determination not to count as income amounts which they do not in fact receive is certainly not

"so bizarre that Congress 'could not have intended' it." *Demarest*, 111 S.Ct. at 604 (citation omitted). Thus, no "rare and exceptional circumstances" exist here, and the foray of the court below into gleaning congressional intent for its position from isolated segments of the SSI statute (App. 11a-12a) violates these basic rules.

The decision of the court of appeals is in apparent conflict with unanimous decisions of this Court and of the New York Court of Appeals. This tension is exacerbated by the need of the court below to deviate dramatically and consistently from established rules of statutory construction in order to attain this result.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1991

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Velma Martin, on behalf of herself and all others similarly situated,
Plaintiff-Appellee,

v.

Louis J. Sullivan, Secretary of the Department of Health and Human Services,*
Defendant-Appellant.

Nos. 88-15024, 88-15279.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 3, 1989.

Decided Aug. 31, 1990.

As Amended May 14, 1991.

Before POOLE, BEEZER and TROTT, Circuit Judges.

POOLE, Circuit Judge:

The Secretary of Health and Human Services (Secretary) appeals the decision of the district court invalidating one of his regulations, 20 C.F.R. § 416.1123(b)(1) (1988), which characterized as "income" for purposes of assessing a person's eligibility for Supplemental Security Income (SSI) benefits amounts not received in hand but which were instead being withheld by other agencies to recoup prior overpayments. *Martin v. Bowen*, 694 F.Supp. 718 (N.D. Cal.1988).

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* Louis J. Sullivan is substituted for his predecessor, Otis R. Bowen, M.D., as Secretary of Health and Human Services. Fed.R.App.P. 43(c)(1).

BACKGROUND

The facts of this case are not in dispute. As the widow of a former railroad employee, Mrs. Velma Martin (Martin) became eligible to receive monthly survivor's benefits from the Railroad Retirement Board (Board) beginning in December 1978. In May 1985, the Board notified Martin that she had been overpaid during the first four years in the amount of $8,528.92 because she had neglected to report additional income. To recover the amount owing, the Board informed Martin that her entire monthly benefit of $268.16 would be suspended for a period of 34 months. As a result of this withholding Martin's monthly income was reduced to about $386, the amount she received in Social Security Retirement Benefits.

Martin petitioned the Board for a waiver of the recovery. Her request was denied, however, because she was deemed to be at fault in causing the overpayment. In January 1987, Martin applied to the Social Security Administration (SSA) for SSI benefits to supplement her Social Security Retirement Benefits. The SSA denied Martin's application based upon its determination that her total income exceeded the maximum income permissible for SSI eligibility. In computing Martin's income, the agency relied on 20 C.F.R. § 416.1123(b)(1).[1] Based upon

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[1] This regulation reads in pertinent part:

(b) *Amount considered as income*

We may include more or less of your unearned income than you actually receive.

(Continued on following page)

that regulation, the SSA included as income attributable to Martin those sums which were being withheld by the Board to recover the prior overpayment of benefits.

Martin exhausted the available administrative channels of review without success. Subsequently, she brought a challenge to 20 C.F.R. § 416.1123(b)(1) in district court, claiming that the regulation violated both the language and the intent of Title XVI of the Social Security Act (Act), 42 U.S.C. § 1381, et seq., and that it denied her equal protection under the fifth amendment.[2] The parties filed cross motions for summary judgment and Martin filed a motion for certification of a circuit-wide class of plaintiffs. Martin also filed a motion for monetary and injunctive relief on behalf of herself and the class.

In No. 88-15024 the Secretary appeals the district court's order granting plaintiff's motions for summary judgment and class certification. No. 88-15799 represents the Secretary's appeal from the court's second order affording to plaintiff and plaintiff's class injunctive and monetary relief. These two appeals have been consolidated. The district court had jurisdiction over the action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), and 28 U.S.C. § 1361. We have jurisdiction under 28 U.S.C. § 1291.

(Continued from previous page)

(1) We include more than you actually receive where another benefit payment . . . has been reduced to recover a previous overpayment. You are repaying a legal obligation through the withholding of portions of your benefit amount, and the amount of your debt reduction is also part of your unearned income.

[2] The district court declined to address the merits of Martin's equal protection claim.

DISCUSSION

The district court held that the regulation contravened "both an express statutory command and the overriding intent of Congress"[3] as embodied in 42 U.S.C. § 1382a(a)(2)(B) of the Act, which defines as income any "payments *received* as an annuity, pension, retirement or disability benefit . . . " (district court's emphasis).[4] The district court construed the "any payments received" language of the statute as imposing a requirement of "actual receipt." Thus, because the Secretary's regulation permitted the SSA to count toward a claimant's income benefits which were only constructively received, the court ruled that 20 C.F.R. § 416.1123(b)(1) was inconsistent with its congressional statutory progenitor.

In arriving at its conclusion, the district court departed from the reasoning which has now been adopted by each of the four circuits that have considered this issue. The First, Second, Fifth and Seventh circuits have upheld the validity of the Secretary's regulation, viewing the use of the term "received" in § 1382a(a)(2)(B) not as obtruding any special conditions for making income determinations but rather as nothing more than a mere "grammatical link between 'payments' and the descriptive list of benefits which follows." *Lyon v. Bowen*, 802 F.2d 794, 798 (5th Cir.1986).[5] Instead of relying on

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[3] *Martin*, 694 F.Supp. at 724.

[4] *Martin*, 694 F.Supp. at 720.

[5] In addition to the *Lyon* case, the validity of 20 C.F.R. § 416.1123(b)(1) was upheld in *Robinson v. Bowen*, 650 F.Supp. 1495 (S.D.N.Y.), *aff'd*, 828 F.2d 71 (2d Cir.1987); *Szlosek v. Secretary of Health and Human Services*, 674 F.Supp. 944 (D.Mass.1987), *aff'd*, 861 F.2d 13 (1st Cir.1988) (per curiam); *Healea v. Bowen*, 871 F.2d 48 (7th Cir.1989).

these out-of-circuit cases, the district court relied on two Ninth Circuit decisions that are inapposite to the case at bar. These cases are *Whaley v. Schweiker*, 663 F.2d 871 (9th Cir.1981) and *Summy v. Schweiker*, 688 F.2d 1233 (9th Cir.1982).

In *Whaley*, the plaintiff qualified as a benefit recipient under both 42 U.S.C. § 402(a) and 42 U.S.C. § 1382 of the Social Security Act, and also qualified for a pension as a veteran with a non-service connected disability, under the Veteran's Act (VA), 38 U.S.C. § 521. 663 F.2d at 872-873. The plaintiff's children were also eligible for dependent's benefits under the Veteran's Act. *Id.* The Veteran's Administration combined plaintiff's personal benefits totalling $103.93 with his children's dependent's benefits, totalling $51.11, into a single check, payable to plaintiff, totalling $155.04. *Id.* at 874.

In calculating the plaintiff's SSI benefits, the Secretary included as countable income the $51.11 amount of the dependent children's benefits included in the check. *Whaley*, 663 F.2d at 874. The Secretary argued that because the benefits were delivered to plaintiff in one unapportioned check, the entire monetary amount was actually available to the plaintiff because he was free to use the money as he pleased and thus could apply the pension to his own needs rather than spend it to support his dependents. *Id.* Therefore, the Secretary argued, the plaintiff was no longer eligible for SSI benefits because the entire amount was attributable to him as income under 42 U.S.C. § 1382a(a)(2)(B) and its governing regulations. *Id.* This court, however, rejected the Secretary's arguments and held that the portion of increased pension benefits

paid to a veteran for the support of his dependent children did not constitute income to the veteran for the purpose of computing SSI benefits. *Id.* at 875.

Whaley, however, is distinguishable from the present case. In *Whaley,* the court construed the purposes of the Veteran's Benefit Statute and focused primarily on the fact that under that statute, the VA benefits were specifically intended for the support of the plaintiff's dependent children and that the delivery of the benefits in a single check did not alter this intention. *See Whaley v. Schweiker,* 663 F.2d at 874. In *Whaley,* the court, in essence, determined that the plaintiff acted solely as a trustee for his children and that the funds in no sense belonged to him because the court did not "believe that congress intended either the forced separation of the family or the veteran to use his own separate funds that were intended for his children." 663 F.2d at 875.

In the present case, however, the Railroad Retirement Act (RRA) benefits being withheld by the Board – recouped or unrecouped, apportioned or unapportioned – are solely for Martin. The underlying debt to the Board represents overpaid benefits that aided Martin. Moreover, the Board's withholding of the amount to recover the RRA overpayment actually benefitted her by extinguishing an outstanding debt. Thus, because Martin's income is used to pay off her obligation and because she is benefitting financially from the satisfaction of the debt, the RRA sums being withheld to recover the overpayment are to be considered available income. *See also Lyon v. Bowen,* 802 F.2d at 797.

Likewise, in *Summy*, a claimant for SSI also received a veteran's pension. In that case, the plaintiff received sums from the Veteran's Administration as reimbursement for certain extraordinary medical expenses totalling $286.32. *Summy v. Schweiker*, 688 F.2d at 1234. The Secretary argued that the amount of the reimbursement should be treated as unearned income received under 42 U.S.C. § 1382a(a)(2)(B) since VA pensions are income for purposes of computing SSI benefits and because the VA pension already included the medical expense reimbursement. *Id.* The *Summy* court rejected this argument, noting that the funds could best be treated as a reimbursement "for expenditures previously made over which there was little control and which could not have been used to meet" the plaintiff's basic needs. *Id.* at 1235. Therefore, this court held that the funds could not be included as countable income for purposes of supplemental security income entitlement. *Id.*

Summy, however, is inapplicable to this case. The court specifically stated that its holding was "limited to those items which qualify as a 'third party payment for medical care or medical services furnished to a beneficiary,' under 20 C.F.R. § 416.-1109(a)(1980) . . . " *Id.* at 1235. The *Summy* court also declared that "[it was] not holding that all items 'not income' for VA purposes are also 'not income' for SSI purposes." *Id.* at 1235. Moreover, in *Summy*, the SSI regulations at issue specifically excluded reimbursement for extraordinary medical expenses from the calculation of income. *Id.* at 1234.

In reaching its conclusion, the court in *Summy* relied heavily upon the fact that the special medical expenses

ordinarily must be treated as having been made involuntarily. *Summy v. Schweiker*, 688 F.2d at 1235. Here, however, Martin was at fault in causing the overpayment because she incurred the debt to the Board by failing to report her additional income. The government may prevent dissipation of its own resources through neglect, abuse or fraud. *Lyon v. Bowen*, 802 F.2d at 795. Moreover, because evidence demonstrates that the Board has offered Martin the option of reduced withholding, her debt and repayment obligations to the Board can not be deemed to be beyond her control. *Cf. Summy*, 688 F.2d at 1235.

Finally, in a more recent case not relied upon by the district court, this court again addressed the issue of the proper definition of countable income for purposes of calculating federal benefits, this time in the context of the Medicaid statute, 42 U.S.C. § 1396 et seq. *See Department of Health Services v. Secretary of HHS, (DHS)* 823 F.2d 323, 327 (9th Cir.1987). In *DHS*, this court held that the State of California could treat court-ordered spousal and child support payments as "unavailable" to Medicaid recipients for purposes of Medicaid benefit eligibility determinations. 823 F.2d at 327. Thus, relying on *Whaley*, this court held in *DHS* that since income earmarked for dependents could not be used to reduce the veteran's entitlement to SSI case assistance, income that a Medicaid recipient uses to pay court-ordered child support or alimony cannot be used to reduce the recipient's Medicaid benefits. *Id.* at 328.

DHS is also distinguishable. In *DHS*, the court stated that if SSI regulations were controlling, such regulations would undermine, rather than support the Secretary's position that the statute contemplates the counting of

income earmarked for child and spousal support in calculating benefits. 823 F.2d at 328. The court buttressed this position by noting that SSI and AFDC regulations do not allow child support or alimony payments to be income to the payor because Congress has determined that they are income to the payee and, in the court's view, such income is available to only one person. *Id.* However, as discussed above, the funds here were only earmarked for Martin's benefit. Therefore, the analysis applied in *DHS* with regard to the potential effects of the SSI statute on the issues presented in that case is inapplicable here. Moreover, because the court determined that states do not have to follow SSI eligibility rules in fashioning state plans for Medicaid, the discussion in *DHS* concerning whether child support and alimony payments constitute income for SSI eligibility purposes is merely dicta. *Id.* at 327-328.

In sum, the three above-mentioned cases do not create a broad "actual availability" principle that is to be applied to every case determining what constitutes "income" for purposes of SSI benefits. Not one of the cases in the above Ninth Circuit trilogy involves the SSA calculating as income benefit payments withheld by an agency in order to recoup an unreported prior overpayment. Moreover, these cases do not pertain to a benefit claimant who was at fault in causing the overpayment because she failed to report additional income. In all three cases, the cash actually received by the affected parties was specifically earmarked for different purposes or parties. Based on the reasons stated above, we conclude that *Whaley*, *Summy*, and *DHS* are inapplicable to the present case and rely upon the decisions of the First,

Second, Fifth and Seventh circuits which have decided the very issue at bar.[6]

After reviewing the provision in the context of the entire statutory scheme, we agree with the other circuits that the more plausible construction of § 1382a(a)(2)(B) is that which rejects an actual receipt requirement. As stated in *Robinson v. Bowen*, "[t]he term 'received' appears only in subsection (a)(2)(B) of § 1382a(a)(2); if Congress had specifically intended the use of the term 'received' in subsection (a)(2)(B) to impose a condition of actual receipt on the items enumerated in that subsection, it knew how and would have imposed such a requirement in the other subsections as well." 650 F.Supp. 1495, 1498 (S.D.N.Y.) (footnote omitted), *aff'd*, 828 F.2d 71 (2d Cir. 1987).

The district court also found that the regulation conflicted with the congressional intent underlying the SSI program. It recognized, correctly, that Congress had dual policy concerns in mind when it implemented the SSI program. The first was to assist this Nation's destitute, aged, blind and disabled by guaranteeing to them a minimum level of income to meet their needs for food, clothing and shelter. *See Lyon*, 802 F.2d at 797. The second,

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[6] The Social Security Administration has recently amended related SSI regulations 20 C.F.R. §§ 416.1102, 416.1110 and 416.1123(b)(2). *See* 56 Fed.Reg. 32209-3212 (effective January 29, 1991). While these regulations are not at issue here, they reflect existing policy and clarify the Secretary's position that amounts withheld from earned and unearned income for payment of a debt or other legal obligation are included in income for the purpose of determining eligibility and payment amount under the SSI program.

competing, goal was to preserve the fiscal solvency of the SSI program by protecting its coffers from dissipation through neglect, abuse and fraud. *Id.* Evaluating these conflicting goals, the district court reasoned that since Congress, in 42 U.S.C. § 1383(b)(1)(B), had specifically limited the SSA's rate of recovery of overpaid *SSI* benefits to no greater than ten percent of the debtor's regular monthly payment under that program, by logical extension Congress must have also intended for the SSA to abide by similar standards when dealing with debtors to other benefit programs. This demonstrated, concluded the court, that Congress envisioned the primacy of the first goal over the second.

The consequence of striking the balance of goals in this manner is that SSI funds will be used to partially subsidize a claimant's debt to an outside program whenever the rate of benefits being withheld exceeds 10 percent. We find it difficult to accept the proposition that Congress, in enacting § 1383(b)(1)(B), meant to occasion such a serious externality.[7] Had Congress intended to impose restrictions on the SSA's ability to count as income monies being withheld *regardless of the benefit*

[7] This is not to imply that the ramifications inherent in impairing a claimant's ability to meet his subsistence needs are likely to be any less serious. However, as other courts that have been faced with this challenge have pointed out, by instructing the Secretary to recover overpaid SSI benefits by reducing future SSI payments in cases where the claimant was not without fault, § 1383(b)(1)(B) conclusively demonstrates Congress' willingness to compromise its goal of providing a guaranteed subsistence level of income when necessary to preserve the fiscal integrity of the SSI program. *See, e.g., Robinson*, 650 F.Supp. at 1500.

program involved, we believe that Congress would have made its mandate more explicit. Absent less ambiguous language, we cannot interpret § 1383(b)(1)(B) so broadly.

Several of the courts which have upheld the Secretary's regulation have suggested that their decisions rested to a considerable degree upon the fact that the hardship on the claimants had been mitigated to some extent since they were afforded the option of reduced withholding. *See Lyon*, 802 F.2d at 800-01; *Robinson*, 650 F.Supp. at 1500-01. Here, the Secretary has adduced evidence demonstrating that the Board has a policy in place to permit reduced withholding, and that, indeed, Martin has been offered that option. We find to be without merit Martin's assertion that the Secretary's regulation should be invalidated simply because not all of the programs potentially affected by it clearly provide for reduced withholding. The Secretary has represented the thrust of the general policy. If, in particular situations, it has not been applied, that generally would be the subject of administrative concern and consideration.

Accordingly, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

Velma Martin, on behalf of herself and all others similarly situated, Plaintiff-Appellee,

v.

Louis J. Sullivan, Secretary of the Department of Health and Human Services,* Defendant-Appellant.

Nos. 88-15024, 88-15279

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 3, 1989.

Decided Aug. 31, 1990.

Before POOLE, BEEZER and TROTT, Circuit Judges.

POOLE, Circuit Judge:

The Secretary of Health and Human Services (Secretary) appeals the decision of the district court invalidating one of his regulations, 20 C.F.R. § 416.1123(b)(1) (1988), which characterized as "income" for purposes of assessing a person's eligibility for Supplemental Security Income (SSI) benefits amounts not received in hand but which were instead being withheld by other agencies to recoup prior overpayments. *Martin v. Bowen*, 694 F.Supp. 718 (N.D. Cal. 1988).

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* Louis J. Sullivan is substituted for his predecessor, Otis R. Bowen, M.D., as Secretary of Health and Human Services. Fed.R.App.P. 43(c)(1).

BACKGROUND

The facts of this case are not in dispute. As the widow of a former railroad employee, Mrs. Velma Martin (Martin) became eligible to receive monthly survivor's benefits from the Railroad Retirement Board (Board) beginning in December 1978. In May 1985, the Board notified Martin that she had been overpaid during the first four years in the amount of $8,528.92 because she had neglected to report additional income. To recover the amount owing, the Board informed Martin that her entire monthly benefit of $268.16 would be suspended for a period of 34 months. As a result of this withholding Martin's monthly income was reduced to about $386, the amount she received in Social Security Retirement Benefits.

Martin petitioned the Board for a waiver of the recovery. Her request was denied, however, because she was deemed to be at fault in causing the overpayment. In January 1987, Martin applied to the Social Security Administration (SSA) for SSI benefits to supplement her Social Security Retirement Benefits. The SSA denied Martin's application based upon its determination that her total income exceeded the maximum income permissible for SSI eligibility. In computing Martin's income, the agency relied on 20 C.F.R. § 416.1123(b)(1).[1] Based upon

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[1] This regulation reads in pertinent part:

(b) *Amount considered as income.*

We may include more or less of your unearned income than you actually receive.

(Continued on following page)

that regulation, the SSA included as income attributable to Martin those sums which were being withheld by the Board to recover the prior overpayment of benefits.

Martin exhausted the available administrative channels of review without success. Subsequently, she brought a challenge to 20 C.F.R. § 416.1123(b)(1) in district court, claiming that the regulation violated both the language and the intent of Title XVI of the Social Security Act (Act), 42 U.S.C. § 1381, et seq., and that it denied her equal protection under the fifth amendment.[2] The parties filed cross motions for summary judgment and Martin filed a motion for certification of a circuit-wide class of plaintiffs. Martin also filed a motion for monetary and injunctive relief on behalf of herself and the class.

In No. 88-15024 the Secretary appeals the district court's order granting plaintiff's motions for summary judgment and class certification. No. 88-15799 represents the Secretary's appeal from the court's second order affording to plaintiff and plaintiff's class injunctive and monetary relief. These two appeals have been consolidated. The district court had jurisdiction over the action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3), and 28

(Continued from previous page)

> (1) We include more than you actually receive where another benefit payment . . . has been reduced to recover a previous overpayment. You are repaying a legal obligation through the withholding of portions of your benefit amount, and the amount of your debt reduction is also part of your unearned income.

[2] The district court declined to address the merits of Martin's equal protection claim.

U.S.C. § 1361. We have jurisdiction under 28 U.S.C. § 1291.

DISCUSSION

The district court held that the regulation contravened "both an express statutory command and the overriding intent of Congress"[3] as embodied in 42 U.S.C. § 1382a(a)(2)(B) of the Act, which defines as income "payments *received* as an annuity, pension, retirement or disability benefit . . . " (district court's emphasis).[4] The district court construed the "any payments received" language if the statute as imposing a requirement of "actual receipt." Thus, because the Secretary's regulation permitted the SSA to count toward a claimant's income benefits which were only constructively received, the court ruled that 20 C.F.R. § 416.1123(b)(1) was inconsistent with its congressional statutory progenitor.

In arriving at its conclusion, the district court departed from the reasoning which has now been adopted by each of the four circuits that have considered this issue. The First, Second, Fifth and Seventh circuits have upheld the validity of the Secretary's regulation, viewing the use of the term "received" in § 1382a(a)(2)(B) not as obtruding any special conditions for making income determinations but rather as nothing more than a mere "grammatical link between 'payments' and the

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[3] *Martin*, 694 F.Supp. at 724.

[4] *Martin*, 694 F.Supp. at 720.

descriptive list of benefits which follows." *Lyon v. Bowen*, 802 F.2d 794, 798 (5th Cir. 1986).[5]

After reviewing the provision in the context of the entire statutory scheme, we agree with the other circuits that the more plausible construction of § 1382a(a)(2)(B) is that which rejects an actual receipt requirement. As stated in *Robinson v. Bowen*, "[t]he term 'received' appears only in subsection (a)(2)(B) of § 1382a(a)(2); if Congress had specifically intended the use of the term 'received' in subsection (a)(2)(B) to impose a condition of actual receipt on the items enumerated in that subsection, it knew how and would have imposed such a requirement in the other subsections as well." 650 F.Supp. 1495, 1498 (S.D.N.Y.) (footnote omitted), *aff'd*, 828 F.2d 71 (2d Cir. 1987).

The district court also found that the regulation conflicted with the congressional intent underlying the SSI program. It recognized, correctly, that Congress had dual policy concerns in mind when it implemented the SSI program. The first was to assist this Nation's destitute, aged, blind and disabled by guaranteeing to them a minimum level of income to meet their needs for food, clothing and shelter. *See Lyon*, 802 F.2d at 797. The second, competing, goal was to preserve the fiscal solvency of the SSI program by protecting its coffers from dissipation

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[5] In addition to the *Lyon* case, the validity of 20 C.F.R. § 416.1123(b)(1) was upheld in *Robinson v. Bowen*, 650 F.Supp. 1495 (S.D.N.Y.), *aff'd*, 828 F.2d 71 (2d Cir. 1987); *Szlosek v. Secretary of Health and Human Services*, 674 F.Supp. 944 (D.Mass.1987), *aff'd*, 861 F.2d 13 (1st Cir.1988) (per curiam); *Healea v. Bowen*, 871 F.2d 48 (7th Cir.1989).

through neglect, abuse and fraud. *Id.* Evaluating these conflicting goals, the district court reasoned that since Congress, in 42 U.S.C. § 1383(b)(1)(B), had specifically limited the SSA's rate of recovery of overpaid *SSI* benefits to no greater than ten percent of the debtor's regular monthly payment under that program, by logical extension Congress must have also intended for the SSA to abide by similar standards when dealing with debtors to other benefit programs. This demonstrated, concluded the court, that Congress envisioned the primacy of the first goal over the second.

The consequence of striking the balance of goals in this manner is that SSI funds will be used to partially subsidize a claimant's debt to an outside program whenever the rate of benefits being withheld exceeds 10 percent. We find it difficult to accept the proposition that Congress, in enacting § 1383(b)(1)(B), meant to occasion such a serious externality.[6] Had Congress intended to impose restrictions on the SSA's ability to count as income monies being withheld *regardless of the benefit program involved*, we believe that Congress would have

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[6] This is not to imply that the ramifications inherent in impairing a claimant's ability to meet his subsistence needs are likely to be any less serious. However, as other courts that have been faced with this challenge have pointed out, by instructing the Secretary to recover overpaid SSI benefits by reducing future SSI payments in cases where the claimant was not without fault, § 1383(b)(1)(B) conclusively demonstrates Congress' willingness to compromise its goal of providing a guaranteed subsistence level of income when necessary to preserve the fiscal integrity of the SSI program. *See, e.g., Robinson*, 650 F.Supp. at 1500.

made its mandate more explicit. Absent less ambiguous language, we cannot interpret § 1383(b)(1)(B) so broadly.

Several of the courts which have upheld the Secretary's regulation have suggested that their decisions rested to a considerable degree upon the fact that the hardship on the claimants had been mitigated to some extent since they were afforded the option of reduced withholding. *See Lyon*, 802 F.2d at 800-01; *Robinson*, 650 F.Supp. at 1500-01. Here, the Secretary has adduced evidence demonstrating that the Board has a policy in place to permit reduced withholding, and that, indeed, Martin has been offered that option. We find to be without merit Martin's assertion that the Secretary's regulation should be invalidated simply because not all of the programs potentially affected by it clearly provide for reduced withholding. The Secretary has represented the thrust of the general policy. If, in particular situations, it has not been applied, that generally would be the subject of administrative concern and consideration.

Accordingly, we vacate the judgment of the district court and remand for further proceedings consistent with this opinion.

Velma Martin, on behalf of herself and all others similarly situated, Plaintiff,

v.

Otis R. Bowen, M.D., Secretary of Health and Human Services, Defendant.

No. C 88-0789 TEH.

United States District Court
N.D. California.

June 10, 1988.

ORDER

THELTON E. HENDERSON, District Judge.

This matter comes before the Court on cross-motions for summary judgment and plaintiff's motion for class certification. After careful consideration of the parties' papers and oral arguments of counsel, the Court grants plaintiff's motions for summary judgment and class certification.

1. *Factual Background*

This cases poses the legal question of whether a regulation promulgated by the Secretary of Health and Human Services ("Secretary") violates a congressional statute and the equal protection component of the Fifth Amendment. On a more human level, however, "the issue is whether Congress intended that individuals living at a subsistence level and depending upon [Supplemental Security Income] . . . should have their already meager

incomes slashed through a bureaucratic fiction." Plaintiff's Memorandum of Points and Authorities at 1.

The named plaintiff, Velma Martin, is sixty-nine years old. Her late husband was insured under the Railroad Retirement Benefit Act. He died in 1976, and she became eligible for a monthly widow's benefit in December 1978. She received benefits until May 1985, at which time the Railroad Retirement Board ("Board") informed her that it had overpaid her from 1978 through 1982. She allegedly caused the overpayment by failing to inform the Board of additional earnings. The Board notified her that it would withhold the monthly payments for almost three years, until the debt arising from the overpayments was repaid.

Pursuant to 45 U.S.C. § 231i(c), Martin requested a waiver of recovery of overpayment. To obtain such a waiver, she was required to show that 1) she was not at fault for the overpayment and 2) the withholding would cause severe financial hardship. 20 C.F.R. § 255.10. The Bureau of Retirement Claims noted her financial hardship, but denied the waiver request because they found that she was at fault for the overpayment. An Appeals Referee affirmed the decision, also noting her financial hardship. Neither the Bureau or the Appeals Referee informed her that she could request a reduction in the withholding.

This withholding reduced her income from approximately $660 per month to $386 per month, the amount she received in Social Security Retirement Benefits. Because she was not subsisting on this meager income, she applied for Supplemental Security Income ("SSI") in

1987. The Social Security Administration ("SSA") denied her application; it found that her income exceeded the maximum income allowed for SSI eligibility. In calculating that income, however, the SSA counted her *withheld* monthly Railroad benefit. The SSA based this accounting on 20 C.F.R. § 416.1123(b)(1), which includes benefits that are being withheld to recover overpayments as income received by a claimant.

After unsuccessful appeals within the SSA, plaintiff filed this lawsuit. She does not deny that the regulation was correctly applied to her, but instead argues that the regulation violates the Supplemental Security Income Act, 42 U.S.C. § 1381, and the equal protection component of the Fifth Amendment.

2. *The Statute and the Regulation.*[1]

Congress established the SSI program as "a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled." 42 U.S.C. § 1381. The legislation assures a monthly income for individuals who fall within these categories. The SSI determines both eligibility and the amount of SSI assistance by comparing the beneficiary's earned and unearned income against a national standard. 42 U.S.C. § 1382. Under section 1382a(a)(2)(B), the SSA should include "[a]ny payments received as an annuity,

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[1] This summary of the statute and the regulation borrows heavily, indeed paraphrases, a portion of *Szlosek v. Secretary of Health and Human Services*, 674 F.Supp. 944, 946-947 (D.Mass.1987), *appeal pending*, No. 88-1141 (1st Cir.).

pension, retirement, or disability benefit . . . " as income of the beneficiary.

When the SSI statute was enacted, the Secretary's predecessor did not include withheld benefits as income, finding that only income actually possessed by the claimant should be used to determine SSI eligibility. 20 C.F.R. § 416.1120 (1977). Under the old policy, the Secretary defined income as "anything an individual receives in cash or in kind that can be used to meet his or her needs for food, clothing, and shelter." 44 Fed.Reg. 6430 (Feb. 1, 1979).

The Secretary completely reversed this policy in 1982 by promulgating 20 C.F.R. § 416.1123(b)(1), the regulation at issue here. That regulation requires the SSA to include more income than a claimant actually receives "where another benefit payment . . . has been reduced to recover a previous overpayment . . . " That is, the Secretary counts withheld benefits as being received by the claimant, even though the claimant does not actually receive the benefits. Thus, the regulation substitutes *entitlement* to benefits for *actual receipt* of benefits as the proper definition of income. As demonstrated by Ms. Martin's case, this policy reversal causes rather drastic results. This policy change was not based on any substantive changes in the SSI statute.

The question presented is whether the new regulation violates the SSI Act and the equal protection component of the Fifth Amendment. Five courts in other circuits have already reviewed this challenge,[2] but this is the first

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[2] Four of these courts have rejected the challenge. *See Robinson v. Bowen*, 650 F.Supp. 1495 (S.D.N.Y.1987), *aff'd* 828

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case raising this issue in this circuit. We begin with a review Martin's statutory claims.

3. *Degree of Deference.*

The parties dispute the degree of deference with which we should review this regulation. In *Robinson v. Bowen*, 650 F.Supp. 1495 (S.D.N.Y.1987), *aff'd* 828 F.2d 71 (2d Cir.1987), the court reviewed this same regulation at issue here. The court enunciated two reasons why this regulation is entitled to less deference than the usual regulatory interpretation of a statute. First, the 1982 regulation was promulgated nine years after the statute was passed. 650 F.Supp. 1497. Second, the regulation reversed the Secretary's nine year policy of not counting withheld payments as income received. *Id.* at 1497. Thus, the court stated that it would be "more reluctant to defer to the agency's interpretation" though the interpretation was "entitled to some deference." *Id.* at 1497-1498. In reviewing this regulation, we adhere to that same standard.

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F.2d 71 (2d Cir. 1987); *Lyon v. Bowen*, 802 F.2d 794 (5th Cir. 1986); and *Szlosek v. Secretary of Health and Human Services*, 674 F.Supp. 944 (D.Mass. 1987), *appeal pending*, No. 88-1141 (1st Cir.). One court has invalidated the regulation. *Healea v. Bowen*, No. 86-3060 (C.D.Ill., May 6, 1987), *appeal pending*, No. 87-2300 (7th Cir.). When citing the *Robinson* case, we will typically cite to the district court opinion, because the appellate opinion rather summarily affirms the reasoning of the district court. However, one of the appellate judges in *Robinson* dissented from the affirmance; that dissent will also be cited.

4. *Statutory Construction.*

Plaintiff argues that this regulation violates the statutory definition of income provided in 42 U.S.C. § 1382a(a)(2)(B). This subsection defines income as "payments *received* as an annuity, pension, retirement, or disability benefit . . . " (emphasis added) Plaintiff contends that Congress used the word "received" to require the actual receipt of money. If so, the Secretary's counting of Martin's unreceived and withheld retirement benefit violates the statute.

The Secretary, on the other hand, defends the regulation by arguing that Congress only meant "constructive receipt" of these benefits.

Four of the five courts that have examined this regulation have agreed with the Secretary. All four courts make much of the fact that in other subsections of the statute, Congress listed similar types of income without using the word "received." For example, subsection (E) includes "gifts (cash or otherwise), support and alimony payments, and inheritances" as income, without using the word received. *Robinson, supra,* 650 F.Supp. at 1498, *Lyon, supra,* 802 F.2d at 798, *Szlosek, supra,* 674 F.Supp. at 948. Since Congress did not explicitly require actual receipt of these other types of income, these courts have concluded that Congress did not intend to require actual receipt of the benefits described in subsection (B). Instead, the word "received" "serves only as a grammatical link between 'payments' and the descriptive list of benefits which follows." 802 F.2d at 798.

With all due respect, we believe that the courts have made too much of these omissions. First, Congress did

use terminology comparable to the word "received" in other subsections. For example, subsection (A) lists "support and maintenance *furnished* in cash or in kind." (emphasis added). Similarly, subsection (D) instructs the Secretary to include the *proceeds* of life insurance as income, thereby connoting actual availability. While Congress did not use verbs connoting receipt for subsections (C), (E), and (F), it did use those verbs for subsections (A) and (B). These four courts have found that the nonexistence of an explicit receipt requirement in subsections (C), (E), and (F), negates the existence of the explicit receipt requirement in subsections (A) and (B). However, it is just as logical to assume that the explicit requirement in subsections (A) and (B) implies a comparable receipt requirement in (C), (E), and (F). At the very least, we believe that this rejection of the plain meaning of the word "received" rests on an exceedingly tenuous theory.

Our construction of the statute as requiring actual receipt is informed by several Ninth Circuit decisions that address similar disputes. For example, in *Whaley v. Schweiker*, 663 F.2d 871 (9th Cir.1981), an SSI claimant with two minor children also received a monthly veteran's pension benefit. The statute governing the pension made his children separately eligible for pension benefits. Each month, the Veterans Administration ("VA") sent Whaley a check for approximately $150, $100 of which was earmarked for his use, with the remaining $50 for the children. In calculating Whaley's income to determine his eligibility for SSI, the Secretary included the $50 targeted for the children as income received by Whaley. *Id.* at 873-874.

The Ninth Circuit held that the Secretary erroneously included the $50 sum. The court rejected the Secretary's argument that the $50 should be counted as Whaley's income since he was not legally obligated to use the money for his children. Instead, the court held that the Secretary must assume that Whaley would in good faith spend the money for his children's needs. Since that money was therefore not available to meet Whaley's own needs, it should not be deemed his income. *Id.* at 874-875.

Similarly, in *Summy v. Schweiker*, 688 F.2d 1233 (9th Cir.1982), Summy, a claimant for SSI, also received a veteran's pension. He incurred an unusual medical expense, and the VA sent him a reimbursement check for the expense. The Secretary counted that payment as income received by Summy, and on that basis denied him SSI payments for one quarter of a year. *Id.* at 1234. Defending this accounting before the Ninth Circuit, the Secretary argued that the payment should be considered income received, since Summy's "pension was augmented with funds which when received were as spendable as any other dollar of the pension." *Id.* at 1235.

The court rejected this argument. The court noted that when it decided *Whaley*, it "carefully examined when the receipt of an item of value by an SSI beneficiary constitutes income which is *actually available* to meet the beneficiary's basic needs." *Id.* at 1235, emphasis added. The court then held that the payment represented reimbursement for expenses over which the recipient had no control. Since that prior expenditure "could not have been used to meet the 'basic needs for food, clothing the shelter,' " it would not "advance[ ] the purposes of the SSI program" to count that payment as income received.

Id. at 1235. *Accord, Jackson v. Schweiker*, 683 F.2d 1076, 1082-1084 (7th Cir.1982), holding that the difference between the fair market value of a recipient's rent and the rent actually paid may not be treated as income, since it is not actually available to meet the recipient's needs; *McDermott v. Secretary of Health and Human Services*, 612 F.Supp. 202, 205 (W.D.N.Y.1985), holding that the garnish wages of a parent may not be deemed income accruing to the child, though non-garnished wages may be attributed to the child.

These cases are united by the same underlying principle: funds that a recipient cannot actually use to meet her basic needs should not be treated as income for SSI eligibility.[3] As Judge Oakes stated in his dissent in *Robinson*, "[t]he statute should be read as requiring that SSI benefits be calculated on the basis of income . . . *actually available* to a claimant to satisfy his needs." 828 F.2d at 74 (Oakes, J., dissenting) (emphasis added). Since the claimant's "withheld VA benefits do nothing at all to enhance [her] purchasing power," they should not be counted to defeat a claimant's eligibility to SSI. *Id.*

The constructive receipt regulation is fundamentally at odds with the actual availability standard elucidated by these courts. It is also directly contrary to the plain

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[3] In our view, the facts of this case present an even stronger need to examine the concept of receipt realistically than the facts presented in *Whaley* and *Summy*. In both of those cases, the recipient actually received cash, though it was earmarked for particular purposes. In addition, that cash could be used for meeting the recipients' basic needs. Here, Martin never receives the cash, so that no portion of it is available to meet her needs.

meaning of the word "received." However, we do not end our inquiry at this statutory construction stage. Instead, we now examine whether the regulation is consistent with underlying congressional intent.

5. Congressional Intent.

Even if we did not find the statutory language dispositive, we find other indicia of congressional intent which compel the invalidation of this regulation.

First, and most importantly, we believe that the regulation conflicts with the basic purpose of the SSI program. SSI is a categorical, needs-based program designed to provide an income "floor" below which the elderly, disabled, and blind may not go. Congress intended to "provide positive assurance that the Nation's aged, blind and disabled people would not longer have to subsist on below-poverty level incomes." S.Rep. No. 92-1230, 92d Cong.2d Sess. (1972), U.S.Code Cong. & Admin.News 1972 p. 4989. Senator Long, Chairman of the Senate Finance Committee, described the program as providing a "guaranteed monthly income" and "assured monthly income." 118 Cong.Rec. 36805, 36812 (Oct. 17, 1972). Indeed, Congress was so concerned that the program be available to meet recipient's needs that they prohibited any garnishment or attachment of SSI funds to pay a recipient's debts. 42 U.S.C. § 407 (incorporated in Subchapter XVI by 42 U.S.C. § 1383(d)(1)) (Supp. III 1985).

By enacting SSI, Congress erected a safety net to catch those who are unable to provide for their basic needs. By promulgating this regulation, the Secretary has carved a rather wide hole in that net; the regulation has

consigned Martin and others with similar circumstances to an income well below the poverty level.

The four courts that have upheld the regulation did not ignore this congressional intent. However, they found that Congress had enunciated a competing goal: ensuring the fiscal solvency of the program. The courts agreed with the Secretary that the regulation serves this goal. If a debtor of one federal program can use that indebtedness to establish his or her eligibility to SSI, the debtor is then using SSI funds to, in essence, pay off the debt to that other program. By preventing a debtor from establishing SSI eligibility on the basis of the debt, the regulation prevents the siphoning off of SSI funds. *See Robinson*, 650 F.Supp. at 1500. Thus, these courts have upheld the Secretary's regulation on the grounds that it balances Congress' competing goals of minimum subsistence and fiscal solvency.

We have seriously considered this subsidy argument, and have been careful to defer to the Secretary's weighing of the fiscal solvency and minimum subsistence goals. Moreover, we know that cases with "hard" facts often produce bad law, and we have tried arduously to avoid denigrating the importance of the regulation merely because it produces some unsavory results. However, while we agree that Congress did include fiscal solvency as one of its goals, we respectfully disagree that Congress could have intended to strike the balance reflected in the regulation.

Our conclusion is informed by the way in which Congress had dealt with the overpayment of *SSI* funds. 42 U.S.C. § 1383(b)(1)(B) provides that "absent fraud,

willfull misprepresentation, or concealment of material information," the SSA may not deduct more than ten percent of a beneficiary's monthly payment to recover prior SSI overpayments to that beneficiary. That provision does not apply here, since Martin is repaying Railroad Retirement Benefits, not SSI benefits. However, the existence of that provision is a trustworthy guidepost of congressional intent for how the SSA should treat debt repayment for other programs.

By enacting this provision, Congress balanced the goals of minimum subsistence and program solvency. The provision allows a recipient to fall below the subsistence level to pay a debt to the SSI program, but strictly limits the amount of income reduction to ten percent of the SSI benefit. Here, Ms. Martin's income has been "reduced" by almost one-third, since her current monthly income is now $386, rather than the $575 she would receive if eligible for SSI.

Thus, the regulation drastically conflicts with the ten percent balance struck by congress as well Congress' overriding intent, and strongly suggests to us that Congress could not have intended the Secretary to so harshly treat debt payments to other programs.

Relief Provisions.

Three of the four courts which have upheld the regulation hinged their decision on other regulations which alleviate the harsh effects of this regulation. In *Lyon*, the Fifth Circuit stated that its decision to uphold the regulation might have been different were it not for the relief provided in 20 C.F.R. § 404.502(c). 802 F.2d at 801. That

section allows an overpaid recipient of Social Security Disability Benefits to petition for a reduction in withholding of future benefits if such withholding would "deprive the person of income required for ordinary and necessary living expenses."[4] Indeed, the claimant in *Lyon* did successfully apply for this relief; his monthly benefits were reduced by only $10 per month to pay for the prior overpayment. *Id.* As the court stated, "[a] difference of $10 between what is actually received and what is 'constructively' received under [the challenged regulation] need not concern us." *Id.* The court then cautioned: "if a greater portion were being withheld – one hundred percent, for example – there would be greater concern that counting the benefits as being 'received' under § 1382a(a)(2) of the Act is arbitrary and unreasonable."[5]

We have before us just such a case – the entire portion of Martin's benefit payment is being withheld. Thus, there is a large, perhaps even life-sustaining difference between the "actual" receipt of $386 and the "constructive" receipt of $654.16, (the $386 plus her unreceived, withheld $268.16 Railroad Retirement Benefit). Given the *Lyon* court's ringing caveat that its decision hinged on Lyon's success in obtaining reduced withholding, we are confident that the court would rule differently if presented with the facts of this case.

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[4] This relief provision does not apply to Martin, because the provision is available only for recipients of Social Security Disability benefits. As noted, Martin receives benefits from the Railroad Retirement Program.

[5] *See also Robinson*, noting that a similar VA regulation allows a recipient to petition for reduced withholding, based on the recipient's inability to pay. 650 F.Supp. at 1501.

Plaintiff argues that the Railroad Retirement Regulations do not provide for similar reduced withholding. The Secretary disagrees. The Secretary calls our attention to 20 C.F.R. § 255.13 and 255.14. Section 255.13 allows the Board to compromise recovery of overpayments that do not exceed $20,000. Section 255.14 instructs the Board to consider, *inter alia*, the debtor's ability to pay when determining whether to compromise. However, "[c]ompromise is at all times within the discretionary authority of the Board or its designee." 20 C.F.R. § 255.13. Thus, these regulations do not compel the Board to grant reduced withholding relief. Moreover, since the regulation gives the Board this discretion, the Board's denial of a compromise appears to be insulated from judicial review as "agency action committed to agency discretion by law." 5 U.S.C. § 701(a)(2).

Furthermore, even if Martin had a right to petition for reduced withholding, she was never given notice of this right. The failure of the Railroad Bureau to provide this notice is particularly mysterious, because it noted her financial hardship when she applied for a *waiver* of the withholding. As already stated, the waiver application was denied; though Martin had satisfied the "hardship" prong of the waiver test, she could not demonstrate that the overpayment was not her fault. Without automatic notice of the relief provision, there is no guarantee that recipients like Martin will be able to even apply for that relief. As a result, there is no guarantee that the harsh effects of the Secretary's regulation will be alleviated for SSI claimants like Martin.

Finally, the constructive receipt regulation applies to numerous benefit programs, both public and private. The

Secretary does not contend that *all* of these programs contain provisions for reduced withholding. Therefore, we may not uphold the constructive receipt regulation on the basis that other regulations contained in other benefit programs soften its harsh effect. We agree with the *Lyon* court that the relief provision available to that plaintiff sufficiently softened the draconian effects of the constructive receipt regulation. However, we disagree that in this class action suit, we may rely on a particular relief provision to validate the regulation, since the regulation applies whether or not a benefit program has a relief provision.[6]

Conclusion.

For all of these reasons, we feel we must depart from the reasoning of the other courts. We find that the regulation violates both an express statutory command and the overriding intent of Congress. In addition, in our view, the Secretary has impermissibly inserted an additional eligibility criteria into the SSI program: the concept of fault. That is, the Secretary has implicitly determined that those individuals who are thrust into poverty as a result of their debts to another benefit program are not entitled to SSI's income maintenance.

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[6] These relief provisions may be relevant, however, in shaping a new regulation. For example, under a new regulation the Secretary could consider whether a claimant was entitled to reduced withholding from another program in determining whether to apply a constructive receipt policy to that claimant. A more narrowly tailored regulation might avoid contravening congressional intent.

It bears repeating that this is a program of last resort for people in need, *regardless* of the circumstances that caused that need. SSI "subsidizes" the debts of gamblers, the liquor of alcoholics, and the lifestyles of those who improvidently failed to save enough income to avoid poverty later in life. Congress made the difficult policy choice to provide a guaranteed income for three categories of individuals. We believe that fault has no place in SSI's broad charter; the program does not distinguish between the "deserving" and the "undeserving" poor, but rather provides cash to meet the basic needs of the elderly, disabled, and blind, simply because they are poor, needy, and human. Congress intended no "debtor" exception to this principle.

Therefore, we hold that this regulation is arbitrary, capricious, and contrary to law, and strike it as invalid.[7]

Class Certification.

Plaintiff moves to certify a class of all persons residing in the Ninth Circuit "whose SSI benefits have been, are being, or will be denied, terminated, or reduced" because of the constructive receipt regulation. Plaintiff argues that the four requirements of Federal Rule of Civil Procedure 23(a) have been met, and proposes that we certify the class under Rule 23(b)(2), which requires that "the party opposing the class has acted . . . on grounds

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[7] Since we have invalidated the regulation on statutory grounds, we do not address plaintiff's equal protection argument.

generally applicable to the class, thereby making appropriate final injunctive relief . . . with respect to the class as a whole . . . "

The Secretary's sole argument against certification is that the "numerosity" requirement of 23(a) has not been met. The Secretary contends that only claimants who have exhausted their administrative remedies may challenge this regulation. Since plaintiff has failed to show that there are numerous claimants who have exhausted their administrative remedies, we should not certify this class.

The Court will not tarry long on this argument. The Supreme Court has clearly held that exhaustion is not required for class action lawsuits challenging a classwide Social Security *policy. See Bowen v. City of New York*, 476 U.S. 467, 106 S.Ct. 2022, 2031-2033, 90 L.Ed.2d 462 (1986). This decision, and the many others following it, is based on the common-sense conclusion that it would be absurd to require every claimant affected by a regulation to appear before the Secretary and separately challenge its statutory and constitutional validity. In this case, the Secretary has announced his policy, and has had ample opportunity to modify the regulation if he wished to do so. The Secretary intends to continue to apply this regulation in every appropriate case. Therefore, no policy is served by requiring each individual to exhaust administrative remedies before joining in this lawsuit.

We find that plaintiff has met all the requirements of Rule 23, and certify the proposed class.

IT IS SO ORDERED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Velma MARTIN, on behalf of herself and all others similarly situated, Plaintiff-Appellee, v. Louis J. SULLIVAN, Secretary of the Department of Health and Human Services,* Defendant-Appellant.	)	Nos. 88-15024, 88-15279 D.C. No. CV-88-0789-TEH ORDER FILED JUN 24 1991

Before: POOLE, BEEZER, and TROTT, Circuit Judges.

Appellee's motion for leave to file a supplemental memorandum in support of her petition for rehearing and suggestion for rehearing en banc is granted. The supplemental memorandum received in this court on May 23, 1991 is ordered file.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to FRAP 35(b), the petition for rehearing and the suggestion for rehearing en banc is rejected.

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* Louis J. Sullivan is substituted for his predecessor, Otis R. Bowen, M.D., as Secretary of Health and Human Services. Fed. R. App. P. 43(c)(1).